No. 95-1202

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

IEZHJA HARTSELL, A Minor By Next Friend, JERRY UPTON,

Petitioner,

vs.

FORT SANDERS REGIONAL MEDICAL CENTER and RICHARD O. MANNING, M.D.,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for Tennessee, Eastern Section

BRIEF IN OPPOSITION FOR RESPONDENT FORT SANDERS REGIONAL MEDICAL CENTER

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QUESTION PRESENTED FOR REVIEW

Does the Fourteenth Amendment dictate that either Tennessee's common law of battery or Tennessee's statutes regulating abortion procedures must apply to the cessation of artificial life support measures in behalf of an unaborted newborn infant?

CORPORATE AFFILIATES OF RESPONDENT

Respondent Fort Sanders Regional Medical Center is a wholly-owned subsidiary corporation of Fort Sanders Alliance, a Tennessee non-profit corporation. The respondent owns no subsidiary corporations.

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OPINION BELOW

Hartsell v. Fort Sanders Regional Medical Center, 905 S.W. 2d 944 (Tenn. Ct. App. 1995) (Appl. Perm. To App. Den. 1995).

STATEMENT OF JURISDICTION

The United States Supreme Court lacks jurisdiction over the Petition because the judgment of the Tennessee Court of Appeals, Eastern Section, did not adjudicate any claimed rights, privileges, or immunities under the United States Constitution or any other federal law. 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The named petitioner (hereinafter "plaintiff") was born, at a severely premature stage of gestational development on September 28, 1983 at the respondent hospital, Fort Sanders Regional Medical Center. Both prior to and immediately after the plaintiff's birth, the obstetrician, Richard O. Manning, M.D. (hereinafter "Dr. Manning") determined from objective indications of the gestational age of the plaintiff that she was not "viable" or capable of living on her own. Accordingly, Dr. Manning instructed the hospital's nursing staff to discontinue artificial life-support measures they had instituted in plaintiff's behalf.

Less than an hour later, plaintiff's efforts to continue breathing were observed, and artificial life-support measures in her behalf were reinstituted. The plaintiff survived, but claims to have been injured by her experience immediately after her birth. At no time did any physician or hospital staff member attempt to terminate plaintiff's mother's pregnancy by any means other than natural childbirth, and at no time did anyone undertake any affirmative action to shorten plaintiff's life beyond the withdrawal of artificial life-support measures.

The plaintiff, through a "next friend," sued Dr. Manning and the hospital in a Tennessee state court six years later, on the theory that the cessation of artificial life support measures after plaintiff's natural birth constituted medical malpractice, and/or a battery. The plaintiff later added to her suit a theory of outrageous conduct, and a claimed violation of one of Tennessee's *abortion* regulation statutes, Tenn. Code Ann. § 39-4-206 (now codified at Tenn. Code Ann. § 39-15-206), despite the fact plaintiff did not claim, in state court, to be the victim of an induced abortion.

The trial court dismissed plaintiff's claims of outrageous conduct and battery. The trial court also dismissed plaintiff's statutory claim derived from Tennessee's abortion statute. The trial court proceeded with a jury trial on plaintiff's remaining medical malpractice claim. The trial court directed a verdict for the respondent hospital in the course of that trial, but ultimately, the jury rendered a general defense verdict in behalf of Dr. Manning, implicitly finding that Dr. Manning's actions either were not medical malpractice, or else caused no harm to the plaintiff, or both.

The Tennessee Court of Appeals for the Eastern Section affirmed. That court held that the dismissal of plaintiff's battery claim was proper because Dr. Manning, and the hospital staff, had plaintiff's mother's consent to render medical treatment to the newborn infant at her birth. The court further affirmed the trial court's dismissal of plaintiff's statutory claim, based on Tennessee's abortion statute, on the ground that that statute did not apply to unaborted, newborn infants like the plaintiff. The Court of Appeals addressed no federal constitutional issues. The Tennessee Supreme Court denied discretionary review of plaintiff's claims.

REASONS FOR DENYING THE WRIT

The plaintiff asserts that the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution compel the State of Tennessee, and its courts, to grant the plaintiff a jury trial on either her claim of common law battery, or else her statutory claim based on one of Tennessee's abortion regulations. The plaintiff cites no decision of this Court, no decision of any federal Circuit Court, and indeed no legal authority at all to support that interpretation of the Fourteenth Amendment. To the contrary, the Fourteenth Amendment does not compel states to offer common law damage remedies for privately caused injuries at all; and when they do offer such remedies, the Fourteenth Amendment does not compel any particular form, characterization, classification, or minimal elements for those remedies. *See Martinez v. State of Calif.*, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980). Likewise, the Constitution does not compel the states to promulgate abortion regulations. If the states choose to promulgate such regulations, the Constitution does not require the states to include civil remedies therein for unaborted children who have undergone natural childbirth. The Fourteenth Amendment limits *state* actions only; it does not purport to impose requirements of state protection against purely *private* actions. *DeShaney v. Winnebago County*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

The scope, extent, reach and application of a state's tort law are strictly matters of state law, and for state judicial determination only. *Ferri v. Ackerman*, 444 U.S. 197, 100 S. Ct. 402, 62 L. Ed. 2d 335 (1979) ("when state law creates a cause of action, the state is free to define the defenses to that claim. . . ." 444 U.S. at 198, 100 S. Ct. at 406). Likewise, the interpretation of state abortion regulations, including the interpretation of who is to be protected by them, are strictly questions of state law, and

state judicial determination only. Federal constitutional law imposes certain limits and restrictions on how far states can go in those areas, but the Constitution imposes absolutely *no* affirmative requirements of what state law *must* provide in the area of civil torts, or abortion regulation. *See Martinez, supra; Ferri, supra; DeShaney, supra.*

Accordingly, in arguing that Tennessee's courts *should have* recognized and tried either the plaintiff's common law battery claim, or else her state statutory abortion claim, the plaintiff argues issues of state law only, which are merely dressed, superficially, in the verbiage of federal constitutional rights. Applying the criteria for consideration of Petitions for the Writ found in Supreme Court Rule 10, the petitioner (who never cites or refers to Rule 10, or any of its criteria, in her Petition) has not identified any decision by any court that conflicts with the decision of the Tennessee Court of Appeals in this case *on any question of federal law.*

For that matter the petitioner has not identified any important question of federal law actually "decided by" the Tennessee Court of Appeals in this case. *See* Supreme Court Rule 10(c). The plaintiff actually presented only two arguments of federal law to the Tennessee Court of Appeals. The plaintiff invoked this Court's case of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) in a hard-to-comprehend argument that the present non-abortion case somehow represents an extension or revision of *Roe v. Wade* principles. The plaintiff also invoked one of Tennessee's *abortion* regulation statutes, Tenn. Code Ann. § 39-4-206, and claimed that Fourteenth Amendment equal protection principles required the extension of that *abortion* statute beyond abortion procedures to cover unaborted newborn infants like the plaintiff. The Tennessee Court of Appeals adjudicated neither of these putatively federal claims, leaving this Court without subject matter jurisdiction over the Petition. 28 U.S.C. § 1257.

This is not an abortion case, and never has been! The plaintiff, an unaborted, spontaneously-born infant, has never claimed to be the victim of an abortion *as that term is specifically defined in Tennessee's abortion regulation statutes. See* Tenn. Code Ann. § 39-15-201(a)(1) (defining "abortion" as an attempt to destroy a child "before its birth"). *Roe v. Wade, supra*, addressed the Fourteenth Amendment *privacy* rights of pregnant women against interference by the state. No one has ever claimed any violation of a right to privacy in this case. *Roe v. Wade* has no application, or relevance, to this case, where *no one* attempted to terminate plaintiff's mother's pregnancy before plaintiff's birth. The Tennessee Court of Appeals decided *no* privacy issues whatsoever, much less any privacy issues regarding pregnant women.

The plaintiff's equal protection argument below was equally strained. The plaintiff argued that if Tennessee's abortion statute was not extended to her, as an unaborted infant, then it would unconstitutionally give aborted fetuses more rights to medical care than those given to plaintiff as an unaborted infant. That argument was, and is, premised entirely on an unsupported interpretation of Tennessee law, that Tennessee's abortion statute somehow gives more rights, as a matter of *state* law, to aborted fetuses than otherwise bestowed by *state* law on naturally born children. The Court of Appeals did not adopt or endorse this interpretation of *state law*, and therefore never reached plaintiff's equal protection claim. The Court of Appeals did not have any bona fide claims of aborted fetuses before it to warrant construction of Tennessee's abortion statutes. A court cannot construe a statute that does not affect any parties actually before the court. *See Gorieb v. Fox*, 274 U.S. 603, 47 S. Ct. 675 (1927).

Beyond that, plaintiff's equal protection argument concerning Tennessee's abortion statute, even if accepted at face

value, would go toward the invalidation of that abortion statute, rather than any unprecedented judicial extension of a state statute beyond its expressly stated meaning. The validity or invalidity of Tennessee's abortion regulations under the Fourteenth Amendment cannot be tested in the absence of facts, and of parties actually affected by those regulations. *See Gorieb v. Fox, supra*. The plaintiff has not been affected by any Tennessee abortion regulation! To repeat, this is not an abortion case, and never has been!

Accordingly, the Petition for Writ of Certiorari does not present a federal question within this Court's jurisdiction, because the Tennessee Court of Appeals adjudicated *no* federal questions. Moreover, the Petition should be denied as not raising any substantial federal question within the criteria of Supreme Court Rule 10. Most respectfully, the court should consider awarding sanctions and damages to the respondents for this frivolous filing, pursuant to Supreme Court Rule 42.2 and 28 U.S.C. § 1927.

OTHER MISSTATEMENTS IN THE PETITION

Out of an abundance of precaution, and pursuant to the admonitions of Supreme Court Rule 15.2, the respondent respectfully submits the following list of other misstatements of fact or law contained in the Petition.

> 1. "The decision of an intermediate state appellate court has been held to be the highest court of a state for purposes of certiorari to the United States Supreme Court where the highest court denied discretionary review. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968)." Quotation from page 1 of Petition.

Response: The *Interstate Circuit* case was reviewed by the Supreme Court pursuant to its then mandatory jurisdiction, and not pursuant to its certiorari jurisdiction over state court proceedings under the current version of 28 U.S.C. § 1257. This is not a material issue, however, inasmuch as the petitioner's application for discretionary review before the Tennessee Supreme Court contained the same deficiencies, with respect to *not* raising any bona fide or substantial federal questions, as did petitioner's brief to the Tennessee Court of Appeals.

> 2. "In addition to the injury, pain and suffering Plaintiff endured for the hour she struggled to breath without Defendants' assistance, . . ." Quotation from page 6 of Petition.

Response: These particular damage allegations were never proven, and the general jury verdict against the petitioner may well have rejected them.

> 3. "Subsequently, and *sua sponte*, the trial court offered to and dismissed Plaintiff's cause of action against Defendants alleging battery." Quotation from page 7 of Petition.

Response: In reality, the trial court dismissed plaintiff's battery claims pursuant to defendants' motions for partial summary judgment. *See* Footnote 1, Court of Appeals Decision, 905 S.W. 2d 944 at 947.

> 4. "In this case the facts before the Court posed directly the question of whether the appellant is a citizen at the moment of her birth or whether her citizenship must first pass a test of 'viability' that only her

> physician can administer." Quotation from page 9 of Petition.

Response: The petitioner was granted a trial on her claim for medical malpractice against the defendants, a state-created right available to "citizens" and not available to non-viable fetuses. *See* Tenn. Code Ann. § 20-5-106(c) (extending wrongful death claims only to fetuses "viable" at the time of injury). Dr. Manning's initial determination that plaintiff was not a viable fetus obviously did not forestall the plaintiff's right to a jury trial, as a citizen, on her medical malpractice claim. The procedures followed by Tennessee courts in this case plainly recognized plaintiff's citizenship and state created common law right to sue for personal injuries, *despite* Dr. Manning's initial determination of non-viability. The plaintiff never raised this "question" of her "citizenship" below.

> 5. "It is unconstitutional for either the Tennessee courts or indeed the United States Supreme Court to delegate to members of the medical profession, the determination of which citizens are entitled to the Fourteenth Amendment protection." Quotation from page 12 of Petition.

Response: Obviously no one has done any such thing. Tennessee's courts granted the plaintiff a jury trial on her medical malpractice claim, and the plaintiff lost. That fully satisfies the requirements of the Fourteenth Amendment concerning state tort claims. The plaintiff never raised the question of her "citizenship" below.

> 6. "[Plaintiff] has lost her right to civil remedies guaranteed to every other citizen." Quotation from page 13 of Petition.

Response: Again, the plaintiff was given a civil jury trial on her tort claim, and she lost. The plaintiff has offered no evidence or court precedent to show that any other severely premature infant whose artificial life support measures were withdrawn on the basis of non-viability has been granted a right to sue specifically for battery or for violation of one of Tennessee's abortion statutes. Absent such a showing, the plaintiff's claim of denial of equal protection is an unaddressable hypothetical abstraction.

> 7. "The Court of Appeals of Tennessee, Eastern Section has withheld [plaintiff's] right to seek civil redress for common law and statutory violations by judicial sleight of hand." Quotation from page 13 of Petition.

Response: The Court of Appeals ruled that the consent defense to battery applied as a matter of state law in this case, on the facts before it. The Court of Appeals also ruled that Tennessee's abortion statute did not apply to an unaborted newborn infant. Plaintiff cites no law requiring the state to apply either one or the other of those theories to these facts. At any rate, perceived errors of state law and/or state procedure are not matters of federal Constitutional concern.

> 8. "Defendants' expert justifies the Defendants' actions by addressing Plaintiff's birth in terms of an abortion." Quotation from page 17 of Petition.

Response: Even petitioner's purely semantical arguments, such as this one, misdefine and misconstrue terms. An "abortion" *as used in Tennessee's abortion statutes* clearly means an intentionally induced termination of a pregnancy; not a spontaneous live birth. *See* Tenn. Code Ann. § 39-15-201(a)(1) (defining "abortion").

> 9. "The ruling of the Court of Appeals of Tennessee stands [T.C.A. §39-4-206] on end by impermissibly establishing two classes of infant rights to medical care: ones which can be enforced by civil action under the Tennessee abortion statute and the common law of battery and ones which cannot." Quotation from pages 17 and 18 of Petition.

Response: This statement is based upon petitioner's counsel's own unique, unsanctioned, unsupported, and strained interpretation of the cited abortion statute. Tennessee's courts have certainly never endorsed that interpretation in any reported precedent. In addition, no Tennessee precedent is offered to support plaintiff's bare assertion that an aborted fetus, who is born alive, would necessarily have either a statutory claim (apart from one based on a medical malpractice theory) or a common law right of action for battery in the event his physician withdraws artificial life support measures. The statute nowhere suggests such specific causes of action, and no precedent is offered to show that either exists. The plaintiff's medical malpractice claims based on the withdrawal of artificial life support measures were heard and decided by a jury.

> 10. "The decision of the Court of Appeals of Tennessee is that only physicians and their standard of care can determine the right to receive or withdraw life saving care." Quotation from page 21 of Petition.

Response: The plaintiff was given an opportunity to convince a jury that Dr. Manning had a professional duty of care to provide artificial life support to the plaintiff immediately after her birth. She complains here of nothing more than losing her case.

The State of Tennessee may very well have chosen not to require physicians to render treatment, even potentially life-preserving treatment, that in the exercise of reasonable care, they consider to be ineffective. The petitioner cites absolutely no federal constitutional authority prohibiting states from making such a choice. This Court's case of *Cruzan v. Missouri Department of Health*, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) (which was *never* cited below) validates and recognizes *state* policymaking authority in regulating privately authorized withdrawals of artificial life support measures. The Fourteenth Amendment, which restricts state action only, certainly dictates no contrary policies to the states.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

In addition, the petitioner's trivialization of important constitutional protections, and frivolous filing should be discouraged in the strongest possible terms. The Petition has occupied the time and resources of both of the respondents, as well as of this Court, undoubtedly at some cost to its more important duties. Respectfully, the respondents ask this Court to not only deny the Petition for Writ of Certiorari, but to consider the appropriateness of an award of damages to the respondents pursuant to Supreme Court Rule 42.2 and 28 U.S.C. § 1927.

Respectfully submitted,

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